Supreme Court, U.S.
FILED
DEC 17 2003
OFFICE OF THE CLERK

No. 03-716

IN THE

# Supreme Court of the United States

JONATHAN SHERMAN WHITSON,

*Petitioner,*

*v.*

THE CITY OF GULF SHORES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

WILLIAM F. PATTY
BEERS, ANDERSON, JACKSON, PATTY & VAN HEEST, P.C.
250 Commerce Street
Montgomery, AL 36104
(334) 834-5311

*Attorneys for Respondent*

184814

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There are no additional parties to the above-styled action other than Petitioner Whitson and the Respondent City of Gulf Shores.

The City of Gulf Shores is a municipality organized under the laws of the State of Alabama.

## TABLE OF CONTENTS


*Page*

Parties To The Proceedings And Statement Pursuant To Rule 29.6 ..... i

Table Of Contents ..... ii

Table Of Cited Authorities ..... iv

Correction Of Factual Statement Of Petitioner's Brief ..... 1

1. Areas of Misstatement of Facts ..... 1

2. Summary of Corrected Facts ..... 1

3. Complete Factual Background ..... 3

Reasons For Denying The Petition ..... 16

1. Petitioner failed to establish a *prima facie* case of discrimination under ADA and ADEA and failed to establish pretext sufficient to defeat Respondent's Motion for Summary Judgement ..... 17

A. Whitson failed to establish a *prima facie* case of discrimination under ADA. ... 17

B. Plaintiff failed to establish a *prima facie* case of discrimination under ADEA. .. 21

C. Whitson failed to demonstrate that the reasons given for the restructuring of his job were a pretext for age or disability discrimination. ..... 22

*Contents*

*Page*

D. Whitson does not demonstrate a pretext for discrimination on the basis of age or disability for his termination. ..... 23

2. Petitioner failed to present sufficient evidence that he was qualified under ADA and Petitioner failed to establish an actionable claim for failure to accommodate his disability ..... 25

3. Petitioner failed to present sufficient evidence of a causal link between his complaint with the EEOC and the decision to terminate him. ..... 28

Conclusion ..... 30

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999) ..... 20

*Damron v. Yellow Freight System, Inc.*, 188 F.3d 506 (6th Cir. 1998) .....28, 29

*Duda v. Board of Education of Franklin Park School District No. 84*, 133 F.3d 1054 (7th Cir. 1998) .. 17

*Gaul v. Lucent Technologies*, 134 F.3d 576 (3d Cir. 1998) ..... 18

*Gonzagowski v. Widnall*, 115 F.3d 744 (10th Cir. 1997) ..... 18

*Greenburg v. New York State Department of Correctional Services*, 919 F. Supp. 637 (E.D. N.Y. 1996) ..... 17

*Gross v. Culbro Corporation*, 1987 WL 46324, * 8 (N.D. Fla. 1987) ..... 28

*Hartog v. Wasatch Academy*, 129 F.3d 1078 (10th Cir. 1997) ..... 18

*Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999) ..... 17, 18, 25

*Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001) ..... 25, 26, 27

*Cited Authorities*

*Page*

*McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) ..... 22, 23

*Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000) ..... 21

*Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442 (8th Cir. 1998) ..... 18

*Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 ( 2000) ..... 23, 24

*U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002) ..... 18

*Waggoner v. Olin Corporation*, 169 F.3d 481 (7th Cir. 1999) ..... 18

*Watson v. City of Miami*, 177 F.3d 932 (11th Cir. 1999) ..... 17

**Statutes**

42 U.S.C. § 423 ..... 20

42 U.S.C. § 12101(2) ..... 17

42 U.S.C. § 12112(a) ..... 17, 18, 25

*Page*

**Other Authorities**

29 C.F.R. Pt. 1630 ..... 19

29 C.F.R. Pt. 1630, App. ..... 18

## CORRECTION OF FACTUAL STATEMENT OF PETITIONER'S BRIEF

Briefly below Respondent City of Gulf Shores addresses misstatements of facts contained in Petitioner's Factual Statement. Petitioner Sherman Whitson distorts and minimizes the failure of Whitson to perform his job, the reasons for the City's employment actions, the extensive efforts to rehabilitate him by the City and the City's attempts to accommodate his various complaints.

### 1. *Areas of Misstatement of Facts*

These misstatements are contained in page 2, last paragraph of his brief referring to his ability to perform his job since 1981. There are also misstatements contained in page 3, second paragraph regarding his qualifications and supervisory abilities as well as page 3, paragraph 3. There is incomplete testimony and misstatements regarding accommodations and requested attempts to accommodate Whitson contained in page 3, first paragraph of his brief. Whitson's statements made on page 4, paragraph 2 in his brief about how he refuted the reasons for the employment actions of the City are not true.

### 2. *Summary of Corrected Facts*

In summary, Whitson's performance with the City has been poor, and this poor performance has been well documented. The City has made numerous attempts at progressive discipline to attempt to avoid termination, but when left with no alternative, fired Whitson. From 1989 until he was terminated, Whitson had three different supervisors who sought his termination. He had four different supervisors over the years who had given him negative evaluations. He had a series of negative evaluations (outlined in more detail below), was placed on probation, given warnings and given reprimands. These problem areas involved poor

judgment in permitting, refusal to carry out directives or projects if he did not like them, excessive absenteeism, misrepresentations of his whereabouts during work hours, a general resistance to being managed and poor work attitude.

Eventually the City sought to restructure his job in order to retain him and let him work in areas that he did well and take away items that he was not doing well. Whitson admitted the job restructuring was because City management wanted a manager it could control. Whitson immediately then claimed he was totally disabled from being able to work at all, left work on three-months medical leave (filing a document stating he was unable to work), and applied for long-term disability insurance benefits with a private insurance carrier. In this insurance claim, he and his doctors asserted that he was 100% disabled from work.

For reasons, that he admitted were unrelated to any improvement in health, he sought to return to his job after being absent on medical leave for several months. He was allowed to return to the restructured job and shortly thereafter knowingly refused to carry out certain instructions – failure to perform inspections as directed. His then supervisor moved to terminate him by requesting the termination from the City Mayor. After this termination request had been made, the City then received noticed that he had filed an EEOC claim. He was given a full administrative hearing (with legal counsel present) and was terminated as described in detail below by the Mayor. He admits the Mayor has no discriminating animus against him. In fact, the Mayor on a previous occasion had put him back to work after a prior supervisor in 1990 wanted him terminated, because the Mayor wanted to try to correct the problems rather than fire him. His termination was affirmed by the City Council. He is not aware of any discriminating animus on the part of the Council. There is no evidence that the Mayor or Council simply rubber-stamped

the recommendation of the supervisor recommending termination.

When Whitson was questioned in his deposition about why the job was restructured, he stated that the person who was given his supervisory duties, had been given this position because he was liked better by Whitson's supervisor and would do what management wanted him to do. Whitson also claims that the City did not like him because of testimony Whitson had given in a lawsuit in prior years. That litigation had nothing to do with an employment discrimination claim or an EEOC claim. Whitson never put forth anything to try to demonstrate that the actions in restructuring his job or in his termination were the result of discrimination based on age or disability. He did submit some evidence of falsity (his subjective opinions) of a few of the items underlying his negative evaluations. Most of management's reasons for the different reprimands and negative evaluations over the years went unchallenged by Whitson. But more importantly he admits the reason for the job restructuring – desire by City management for a supervisor it can control better – and for the termination – failure to carry out two inspections after being directed in writing to do so. There is no evidence of falsity of these reasons, and each one are legitimate non-discriminatory reasons.

### 3. *Complete Factual Background*

The City of Gulf Shores has a population of approximately 5,000 people. It is located on the coast of Alabama and proper real estate development for the City is very important. The City is governed by a Mayor and City Council. The present Mayor, David Bodenhamer, has been the Mayor of Gulf Shores since 1988. Prior to being the Mayor of Gulf Shores, he served as a City Councilman for two, four-year terms. The Mayor has known Petitioner Sherman Whitson since 1981, and was generally familiar with

his work record of his entire tenure with the City. Whitson admits that he knows of no discriminatory animus of the Mayor or any Council members towards him.

Whitson began working with the City of Gulf Shores in 1981, and initially reported directly to the Mayor and City Administrator without any intervening supervision. At the time Whitson started with the City, he was a Building Official. There was not a zoning department set up at that time. He had responsibility for the overall planning for zoning and development within the City.

By 1990, the City had grown so that Whitson served as Building Official and was directly supervised by an individual named Steve Griffin, Director of the Community Development Department. Whitson, in turn, supervised two Building Inspectors, until Spring 2000. Once the position of Director of the Community Development Department was established, that individual not only supervised Whitson, but also the Zoning Administrator, secretary for the department, and a permit clerk.

In November of 1995, Steve Foote replaced Steve Griffin as the Director of Community Development Department. Foote would directly supervise Whitson until Whitson's position was restructured so that Whitson was directly supervised by the Chief of Code Enforcement. The Chief of Code Enforcement was, in turn, directly supervised by the Director of Community Development Department.

Before the spring of 2000, in addition to supervising two building inspectors, Whitson was responsible for receiving, reviewing and rejecting or accepting applications for building permits. He had the final decision on interpretation of building code compliance and whether the building permit should be issued. After restructuring Whitson's position, Whitson was directly supervised by the Chief of Code Enforcement, Josh Harris. He also no longer had the final

say on code interpretations. On November 13, 2000, Josh Harris requested that the Mayor terminate Whitson. Mayor Bodenhamer, Foote, Harris, and Mitch Ferguson (Personnel Director) were unaware that Whitson had filed an EEOC charge until November 20, 2000.

Generally, Whitson received favorable evaluations prior to Steve Griffin becoming his supervisor. There were two exceptions. In 1987, his supervisor, George Phillips, rated him negatively on problems on sign code enforcement, and in 1988 rated him negatively on demonstrating competence in providing guidance to the general public on code and zoning matters. Whitson concurred with this assessment. Prior to Steve Griffin becoming Whitson's supervisor, Whitson was not closely managed and pretty much ran this area of the City government as he liked.

In 1989, Steve Griffin took over as Whitson's supervisor. During Griffin's evaluation of Whitson for the period of December 31, 1989 to March 31, 1990 Griffin noted problems had risen in Whitson's interpretations of codes and ordinances for construction within the City jurisdiction. Whitson concurred with this assessment.

On his next evaluation, Steve Griffin rated Whitson negatively again on providing interpretation of codes and ordinances related to construction within the City jurisdiction. This evaluation was done in December of 1990 for the period of April 1, 1990 to October 1990. Griffin rated Whitson negatively on making on-site inspections to insure compliance with approved site subdivision plans. He rated Whitson negatively on assisting the Director of Community and Economic Affairs, and review of site and subdivision plans, and on the issuance of all trade permits and certificates of occupancy. Griffin noted that Whitson's site inspections for zoning uniformity were poor. Several other areas were rated negatively, but more importantly, Griffin rated Whitson, very negatively on job interest and attitude. Steve Griffin

attempted to terminate Whitson in 1991, and Whitson responded with unspecified claims of harassment against Griffin at that time. Whitson admits that he has no specific facts that Griffin's actions were the result of discrimination.

At the time of the evaluation, Whitson was between 44 and 45 years old. He testified that he did have some hearing problems in 1989, but that his hearing did not interfere with his job between 1990-1999.

In 1995, Steve Foote began working for the City and in November 1995, Foote replaced Griffin as Director of Community Development Department and as supervisor of Whitson. Whitson claims that Foote did not know much about the job when he began working at the City and during the first year of Foote's administration as Director, he let Whitson do what Whitson wanted to do. Therefore, the two had no problems even though Whitson still had hearing problems during this period. Whitson claims that he was not discriminated against between March 30, 1995 and March 30, 1996 even though he had a hearing problem.

The following are illustrations of problems with Whitson. On May 16, 1996, by way of a written memo, Whitson was asked by Foote to review filing procedures to determine what was necessary to modify paper files from a name-based system to an address system. By Whitson's own admission, he never got around to implementing this index system after four years of being given the assignment. This incident illustrates the overall problem with Whitson. He disagreed with the way Foote wanted to index the system so he never did it. In August of 1996, Foote had a discussion with Whitson in which he communicated to Whitson that he needed and expected more from Whitson and instructed Whitson that he needed to know what Whitson was working on and needed to be told of any reason that Whitson left the office. This directive was due to Whitson's disappearance from work for extended periods of time. Shortly after that

meeting, Foote had to reprimand Whitson for publicly criticizing Whitson's subordinate. Whitson admits that he criticized Harris, his subordinate, in front of Harris' co-employees.

On October 15, 1996, Whitson indicated that he would be out of work on jury duty in the Circuit Court of Baldwin County. He was supposed to out of work October 15, 16, 17 & 18. Like most Alabama counties, Baldwin County tells jurors to call in each day to find out if they will be needed for jury duty. Whitson learned on October 17, 1996 that he would not have to be present for jury duty that day. Rather than return to work or contact the City and ask for leave, Whitson simply stayed at home. The following week, Whitson turned in his time sheet and represented affirmatively, as well as falsely, to the City that he was absent on October 17 for jury duty. Foote contacted the Circuit Clerk's office in Baldwin County and learned that Whitson had not been on jury duty on October 17, 1996. He confronted Whitson with this fact and Whitson tried to say that he was sick that day. Whitson admitted in his deposition that he knew he was making a false misrepresentation when he turned in this time sheet. Whitson was well aware that he must obtain permission before being out on leave and must let his supervisor know where he was going. A series of reprimands continued in 1997 regarding these problems.

On September 12, 1997, the Mayor received a letter from the State of Alabama Emergency Management Agency that indicated that the City was not in compliance with its regulations regarding a piece of property known as the Walacavage property. This matter was an urgent matter because the Agency indicated to the City that the City might lose participation in the national insurance program if the matter was not resolved. Whitson approved the permit for the Walacavage property after Mr. Walacavage had gone to Josh Harris, Whitson's subordinate and been told that the

permit was not proper. Whitson was instructed in writing to remedy the situation by his supervisors. Follow ups for Whitson to take action on the situation occurred verbally and in writing on several different dates. Whitson did not actively and timely pursue remedying this matter and his lack of action potentially jeopardized the City's participation in the Flood Program. Whitson's argument was that the City and the governmental agency were wrong in their interpretation; however, this argument misses the point. Whitson was undisputedly instructed to take certain action and refused because he disagreed with the City's and the Emergency Management Agency's interpretation.

In October 1997, Foote counseled Whitson again about Whitson's not following the appropriate procedure for providing travel request forms, detailing travel expenses, acting consistently with approved travel request forms, and having any modifications preapproved. This travel problem basically involved Whitson's attempt to make a little extra money by having air travel approved on a travel request form and then using his own personal vehicle to travel in order to receive mileage money. The extra time to travel by vehicle would involve additional leave time for Whitson and time away from work. Whitson had missed many, many days by this point and was behind in his job.

In December 1997, Whitson was counseled because he spent two days sitting at the Courthouse needlessly. Whitson was there to provide documents to the Court for a subpoena from lawyers involved in a lawsuit in which the City was not a party. Foote had communicated to Whitson that Foote had spoken with different lawyers involved in the case in which the documents were requested, and that those lawyers indicated that he did not need to be at the Courthouse. Whitson stayed at the Courthouse anyway sitting in the hallway. That same month, Foote had sent a written memo requesting Whitson take certain actions in December 1997 on a matter. Documentation was also submitted to the trial

court that showed Whitson had never responded to this request. In fact, there are numerous memos and written documentation that was submitted to the Court demonstrating Whitson's failure to timely respond to different tasks requested.

Whitson, in his capacity as Building Official, was responsible for checking code compliance as well as zoning compliance before issuing permits. However, before rendering interpretations of matters involving zoning issues, Whitson was to consult with the Zoning Department. Whitson was counseled in writing on two occasions for not following those instructions. Again in 1998, documentation was submitted to the Court where Whitson was requested to take certain actions on a project and failed to follow the instructions of his supervisor, Foote. The documentation also showed misinterpretations or poor enforcement of code and zoning regulations.

Also, that year, Foote documented his conversations with Whitson in which Whitson basically misrepresented his whereabouts in order to fish when he was supposed to be attending a seminar. There is additional documentation that was submitted to the trial court of the failure of Whitson to carry out his duties regarding a flood management plan, absenteeism, building permits for single family residences, and modifications of flood damage prevention ordinance (to which Whitson was slow to respond and that Foote ultimately had to do the work). There were other actions that Whitson was supposed to carry out and never did. This behavior continued through 1999 and is all documented. None of the activities deal with Whitson's hearing, and according to Whitson's testimony, his hearing through 1999 with the use of a hearing aid was fine and did not impair his ability to perform his job.

Also, during this period, Whitson received a detailed negative evaluation from Steve Foote. This evaluation

criticizes Whitson for a number of areas including that he should spend less time socializing and more time in productive pursuits, his not accepting responsibility for building code functions nor acting to improve them, that he had not set a proper example for work ethic, that he had been negligent in performing plan, permit, and review responsibilities, that he had not updated forms for hand-outs to the public, and referred to reprimands discussed earlier. The evaluation lists different specific instances for poor judgment and errors in permitting properties.

Again, for a period covering September 30, 1997 until June 30, 1999, Foote did an evaluation for Whitson. This evaluation criticized Whitson in a number of areas, particularly about his poor judgment and negligence in issuing permits and plan reviews. He was criticized for not taking initiative in updating the Flood Damage Prevention Ordinances without the supervisor's insistence and that he periodically left the office without informing his supervisor of where he was going and without obtaining permission. Foote notes that Whitson had a higher than normal absenteeism. The evaluation lists a number of areas that were interpretation errors by Whitson. It lists a number of actions that were to be taken to improve his job performance. These actions had either not been timely improved or there had been no improvement at all.

Another evaluation was completed for Whitson from June 30, 1999 to September 15, 2000. This evaluation is also a generally negative evaluation of Whitson's performance. It lists in detail continued problems with his inability or unwillingness to follow supervisor's clear instructions, absenteeism, failure to follow communication directives regarding his whereabouts, inability to improve or update building processes and procedures, and poor judgement in decision making. It lists a number of specific examples of cases where he used poor judgement in issuing permits and

noted that Whitson failed to follow through on code enforcement complaints unless prompted by the department head.

In 2000, Whitson used 485 hours of sick leave. This was used in addition to his attending numerous conferences and working only partial days. During that period, Foote counseled Whitson about misusing his City vehicle. Also, in May 2000, Whitson was given certain assignments as shown in a memo that was submitted to the District Court. Those assignments were not timely performed. In December 2000, Steve Foote left a voicemail for Whitson to attend a staff meeting and Whitson failed to show up because he had left early without any explanation to Foote or without receiving permission to leave early from Foote.

In the Spring 2000, after trying to use warnings, counseling, specific written directives, probation and other methods to correct Whitson's behavior, Foote believed the change in Whitson's position was necessary. Foote did not want Whitson to continue direct supervision of employees when he was so resistant to Foote's supervision and direction. He did not want Whitson making final decisions on code interpretations and permit issuances. He also wanted to make sure a supervisor under his direction could be trusted and would use good judgment. He recognized that Whitson was a long-time employee, but also that Whitson had a number of problems discussed above, and that Whitson had failed to correct those problems after repeated attempts to remedy the problems short of termination by the City.

The decision was made to create a position called Chief of Code Enforcement and that Josh Harris would fill the position. Whitson would report to Josh Harris and the building inspectors who had reported to Whitson would instead report to Josh Harris. Whitson would no longer have final authority for permit issuances, code interpretations and compliance.

Foote believed that Josh Harris would be a good Chief of Code Enforcement because he had observed Harris' work since Harris had been with the City since 1995. He also knew Harris had grown up in the building industry. Whitson really does not dispute the motives for this change. Whitson claims that his work load was too heavy and it inhibited his job performance. Whitson also states that Harris was someone that Foote felt he could control and that this was the "real" reason Foote wanted Harris to supervise Whitson and the other building inspectors. Whitson also claims that restructuring may be related to him being a whistle-blower regarding a case that had nothing to do with age or disability discrimination or any Title VIII discrimination. Whitson had no factual basis to contend that Josh Harris was encouraged by Foote to do anything to Whitson. Whitson did say that he felt Josh Harris had a personal relationship with Foote and that Foote personally liked him over all the other employees in the department, including those who were young and non-disabled. Whitson believes that these reasons for restructuring the job were also reasons behind his termination.

He knows of no discriminatory animus by Foote. Whitson claims that Foote once said in a staff meeting "out with old and in with the new", but on further examination, Whitson admitted this comment was made about the failure to follow procedures that Foote was just implementing and had nothing to do with the age of the employees. Whitson has no evidence of any type of slur or derogatory remark regarding age or disability. In short, other than Whitson giving his opinion that some of his criticized code interpretations were correct, Whitson does not refute the other voluminous negative reprimands, evaluations, and other negative documentation in his employment file.

Whitson admits that he was given his job description after restructuring in June 2000. After the job restructuring was complete, Whitson immediately was absent from work

for almost all of June 2000. He claimed to be on sick leave at that time. On July 19, 2000, one month after the job was restructured, Whitson requested Family and Medical Leave and submitted a doctor's statement stating that he cannot perform the essential functions of his job. It was during this period, that Whitson applied for long-term disability benefits through the City's long-term disability carrier. Whitson represented to this carrier that he was totally disabled from work. Whitson admits that he had previously told Mitch Ferguson, the Personnel Director, in October 1999, that he was going to be unable to work any further if his hearing got much worse. Whitson claims that between 1990 and 1999, his hearing problem did not affect his job. Whitson also stated that his disability has never affected his judgement or his ability to read and understand numerous memos and directives he received. Whitson did testify that his hearing after October 1999 gradually deteriorated, which is consistent with his various applications for disability benefits.

In September 2000, Whitson returned to work with the City, not because of improved health, but because he had run out of sick leave and had not received any long-term disability at the time and needed the money. Shortly after Whitson's return to work, Harris, as his supervisor, had an immediate problem with Whitson's job performance. On September 14, 2000, Harris requested that Whitson perform a specific inspection. The inspection was placed in Whitson's basket that was identified solely with Whitson. This was the same system that Whitson had used to make assignments to building inspectors when he supervised them. Whitson received this assignment at noon. Whitson claims that he did not learn of the assignment until 3:00 p.m. although he was supposedly in the office the entire time. Whitson claimed in his deposition, that he had a lady coming into the office for an appointment and he could not do the inspection. However, he was aware that a contractor and subcontractors were waiting on him to arrive at the inspection

site at 3:00 p.m. Whitson did not attempt to contact these individuals or make alternative arrangements for the inspection. He had not performed the inspection when he was contacted by Harris the following day. Harris found the inspection in Whitson's basket and completed the inspection himself. The problem Harris had with Whitson's performance was not only this missed, urgent inspection for which an appointment had been set, leaving the customer, so to speak, i.e. contractors, waiting and wasting their time, but that Whitson did not contact the contractors, did not try to get word to them to make any alternative arrangements to handle the matter, and did not perform the inspection the first thing the following morning. What was particularly troubling about this situation, was that Harris came into work and performed the inspection the following day and that Whitson did not take any action toward the situation which he was fully aware was an urgent matter in which contractors and subcontractors were going to be mad.

On the heels of this incident, Whitson was told, by a written note, to perform a particular inspection on October 18, 2000. Whitson claimed that he did not understand the note. It is undisputed he failed to carry out the inspection in a timely manner and that Harris undertook the task himself.

On November 13, 2000, before receiving any notice of the EEOC complaint filed by Whitson, Josh Harris asked the Mayor for Whitson's termination. Whitson testified that the EEOC charge was the first notice he had given to anyone at the City that he was being discriminated against on the basis of age or disability.

On December 5, 2000, the Mayor requested Harris to provide him with a more detailed statement of the reasons Harris requested Whitson's termination. Harris complied. A hearing was conducted in February 2001 by the Mayor at which Whitson had legal counsel present. The Mayor stated

in a written opinion that the termination was appropriate for the incidents in September and October 2000 in light of Whitson's work performance in the past ten years.

Since leaving the City's employment, Whitson filed in October 2001, an application for Social Security disability benefits, claiming he was totally and permanently disabled. Whitson admits that he is totally disabled currently from performing his former job. The Social Security regulations do not allow an individual to obtain Social Security Benefits until he has been out of work as least five months. All of Whitson's applications for disability along with his own testimony about his health, indicate that Whitson was unable to physically perform the essential functions of his job from 1999 until his termination in 2001.

Whitson asked for and received the right to tape staff meetings and to have the City pay for a certain number of cassette tapes. He claims that on certain occasions he asked for help with problems regarding humidity. These requests were years prior to his termination and certain actions were taken to determine if there was poor air quality and to rectify possible problems. He was asked twice to have his hearing evaluated. On one occasion in which an evaluation was requested in 1998, Whitson had a lawyer write and say that the City was harassing him by requesting he have his hearing evaluated. Whitson claims that he asked the Personnel Director for assistance in October 1999, but it was a generalized request for help without any specific items requested. Nevertheless, the Personnel Director, Ferguson, requested Whitson have his hearing tested and Whitson did in February 2000. Ferguson received this report. The report did not specify any particular equipment that Whitson had to have in order to perform the essential functions of the job. One of the items mentioned in the report as possibly being helpful to Whitson, Whitson already had – hands-free phone

capability. The report mentioned that Whitson might hear better, but his hearing certainly would not be cured by a digital hearing aid. Whitson already had a hearing aid. This new digital hearing aid would cost the City approximately $4,200. This hearing aid would not be something strictly for a unique business purpose. Finally the document mentions that if Whitson had trouble using a phone a TTY phone might be helpful. This item would cost $775. Ferguson began the process of pricing this information. Whitson had never claimed to not understand people from phone difficulties and his problems in his job performance were unrelated to phone conversations. Shortly after Ferguson began the process of pricing the TTY phone and analyzing its need for Whitson, Whitson left to go on Family and Medical leave described above. The events of the alleged request for accommodations all would have occurred over 180 days from the filing of his EEOC charge.

## REASONS FOR DENYING THE PETITION

There is no conflict between the Court of Appeals' decision in this case and any decision of this Court or prior Eleventh Circuit's decisions. This petition, if Certiorari is granted, would amount in substance to an argument by the petitioner that the trial court and the Eleventh Circuit Court of Appeals misapplied properly stated rules of law. There exists no novel issue of law involving this case. Petitioner attempts to massage the undisputed facts and omit certain facts in his Petition for Writ of Certiorari to fashion a conflict between the Eleventh Circuit and the District Court's decision in this case with this Court's prior precedent. However, a review of the material, undisputed facts demonstrate that no such conflict or novel legal issues exists.

**1. Petitioner failed to establish a *prima facie* case of discrimination under ADA and ADEA and failed to establish pretext sufficient to defeat Respondent's Motion for Summary Judgement**

**A. Whitson failed to establish a *prima facie* case of discrimination under ADA.**

The ADA mandates that employers shall not discriminate against, "a qualified individual with a disability because of the disability of such individual in regards to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a). A *prima facie* case of disability discrimination is made when, by preponderance of the evidence, the plaintiff demonstrates that he 1) has a disability; 2) is a qualified individual with a disability; and 3) was subjected to unlawful discrimination because of a disability. 42 U.S.C. § 12112(a); *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999).

ADA defines a disability as either a physical or mental impairment that substantially limits one or more of the major life activities of an individual, having record of impairment, or being regarded as having such an impairment. 42 U.S.C. § 12101(2). Whether the person has a physical or mental impairment has been defined rather broadly by this Court. Hearing loss is commonly recognized as a physical impairment. Personality traits such as poor judgment or quick-temper are not generally protected impairments under the ADA. *Greenburg v. New York State Department of Correctional Services*, 919 F. Supp. 637 (E.D.N.Y. 1996) (bad judgment not a disability); *Duda v. Board of Education of Franklin Park School District No. 84*, 133 F.3d 1054 (7th Cir. 1998) (irritability not a disability); *Watson v. City of Miami*, 177 F. 3d 932 (11th Cir. 1999) (difficulty interacting

with others and distrustful behavior not sufficient to show impairment under ADA).

Whitson must do more than merely show he has a disability in order to seek the protection of ADA. He must first establish that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12112(a); *see also U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1520 (2000). The essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires. The term does not include marginal functions of the position. 29 C.F.R. § 1630. The essential functions of the job can include attendance, *Hilburn v. Murata*, 181 F.3d 1220 (11th Cir. 1999); *Hartog v. Wasatach Academy*, 129 F.3d 1078 (10th Cir. 1997); *Waggoner v. Olin Corporation*, 169 F.3d 481 (7th Cir. 1999); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442 (8th Cir. 1998), the ability to work with others and receive criticism, *Gonzagowski v. Widnall*, 115 F.3d 744 (10th Cir. 1997); *Gaul v. Lucent Technologies*, 134 F.3d 576 (3d Cir. 1998). The Code of Federal Regulations contains extensive guidance as to how to determine whether an individual with a disability is "qualified". In its Appendix to Title 29, Part 1630, the C.F.R. provides:

> The determination of whether an individual with a disability is 'qualified' should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. The second step is to determine whether or not the individual can

> perform the essential functions of the position held or desired, with or without reasonable accommodation . . . [W]hether an individual with a disability is qualified is to be made at the time of the employment decision.

29 C.F.R. Pt. 1630, App. The City submits that, though Whitson has a disability, at the time decision was made to terminate Whitson's employment on November 13, 2000, as well as his job restructuring in Spring of 2000, Whitson was not a "qualified individual with a disability."

As is reflected by the legitimate, non-discriminatory reasons for Whitson's termination and job restructuring recited above in the Statement of Facts, it was not Whitson's disability that rendered him unqualified to carry out his employment responsibilities, but rather it was his job performance and his refusal to follow management's directions and rules. The City submits that it based its employment decisions on these unprotected and deficient work habits of Whitson rather than on any disability he may have had. Because Whitson has not demonstrated that he was a "qualified individual with a disability" at the time the decision was made to terminate him and restructure his job, he has failed to satisfy the elements of a *prima facie* ADA discrimination case, and summary judgment in the City's favor is, therefore, appropriate on this issue. All the evaluations, reprimands, probations and other employment documentation show a consistent pattern of resistance to supervision.

However, there is undisputed evidence that Whitson, himself, believed that he was not a "qualified individual with a disability." This evidence comes, first, in the form of Whitson's filing for private long-term disability insurance in July of 2000. At that time, Whitson filed a claim seeking long-term disability insurance claiming that he was not capable of performing any work at all. The second indication

that Whitson was not a "qualified individual with a disability" was his submittal on July 19, 2000 of a FMCA claim asserting affirmatively that he could no longer perform the essential function of his job. These documents were submitted one month after the restructuring of his job and four months before his termination was proposed. The third indication that Whitson was not a "qualified individual with a disability" arises from the fact that Whitson began receiving social security disability insurance payments approximately eight months after his termination. Whitson was terminated on February of 2001 and applied for SSDI benefits in October of 2001. Title 42 U.S.C. § 423 imposes a five-month minimum waiting period before an individual may begin collecting social security disability insurance benefits. This means that, under the requirements of § 423, Whitson must have been unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" less than three months after his termination. Whitson's application for and receipt of SSDI benefits such a short period of time after his termination, combined with his application for private disability insurance benefits before his termination, indicates that Whitson believed himself to be totally disabled during the time in which he claims that he was a qualified individual with a disability. Pursuant to *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), summary judgment was proper in that he was not a qualified individual with a disability.

Furthermore, Whitson admits that in October of 1999 he told Mitch Ferguson that he would not be able to work much longer if his hearing deteriorated. He admits since that time his hearing has deteriorated. He cannot climb, cannot stoop, walks with a cane, and has bouts of dizziness and vertigo that can cause him to fall. He now has back problems. Even though he tried to avoid the answer in his deposition, he admits he is totally disabled from work. He cannot

physically perform inspections, his health caused him to miss four times the amount of work as other employees in his department.

**B. Plaintiff failed to establish a *prima facie* case of discrimination under ADEA.**

Two of the elements for establishing a *prima facie* case of age discrimination are that the plaintiff is substantially younger than the person who filled the position from which he was discharged (demoted) and that the plaintiff was qualified to do the job he was discharged (demoted). *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000). The City contends that Whitson cannot establish these two elements of a *prima facie* case of age discrimination. With respect to his termination, Whitson's former position as Building Official was eliminated after his termination and has not been filled by anyone. Whitson was not replaced by a substantially younger person therefore he could not demonstrate to the trial court that he satisfied the third element of a termination claim under ADEA. In regards to Whitson's failure to promote claim, the evidence before the District Court and the Eleventh Circuit Court of Appeals shows that Whitson did not seek, and was not considered for any promotions that were denied him. The job restructuring in the Spring 2000 is not a promotion issue as claimed by the Plaintiff. There was no job open that Whitson applied for or did not receive. Instead, assignments and supervisory authority were removed from Whitson and placed in a different position, solely to address the poor job performance problems of Whitson. Therefore, he was not qualified to hold the "new position" since the restructuring was done for the very reason of addressing his performance problems and to put in a supervisor who management could control.

### C. Whitson failed to demonstrate that the reasons given for the restructuring of his job were a pretext for age or disability discrimination.

Plaintiff's argument is essentially that since he challenges certain opinions of his supervisors in their evaluations and reprimands of him that this challenge creates a material issue of fact for trial on the basis of pretext even though Whitson has admitted in his deposition that the reason for the job restructuring was because the person the City management wanted in the role of a supervisor was someone management could control and who would follow management's directions – the very reason put forth by the City for restructuring the job. Whitson also wishes for the Court to completely ignore his other claim that the restructuring is due to his participation in a lawsuit as a witness where the City was a defendant. The case was not a Title VII case.

There is no direct evidence of discrimination in this case. This Court established in the case of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), a structure for analyzing cases where there is no direct evidence of discrimination. In the burden shifting analyses of *McDonnell-Douglas* once the Plaintiff establishes a *prima facie* case the burden of production shifts to the employers to articulate some legitimate reason for the employer's decision. *Id.* at 802. Once the justification is proffered by the employer for its actions, then the Plaintiff by either, direct or circumstantial evidence, must demonstrate by a preponderance of the evidence that the employer had a discriminatory intent. The evidence of the proffered reason by the City that it restructured Whitson's job because of his resistance to its management's direction, policies, and orders coupled with Whitson's admission that in fact the City wanted someone to hold the duties he held who would be controlled by management and would follow what they want, close the door for Whitson to claim that he has established pretext sufficient to allow him to go forward

to a jury on his age or disability claim of discrimination for the job restructure. Respondent has outlined above in great detail the evidence of the long-standing problems that led to Whitson's job being restructured.

Whitson claims in effect that this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) is in conflict with the Eleventh Circuit's decision in this case. Whitson's reliance on *Reeves* is misplaced. Whitson's ability to submit some evidence of falsity to a few of the evaluations contained in his foot-and-a-half personnel file does not create a material issue of fact to withstand summary judgement. In *Reeves*, the Plaintiff contradicted and showed the falsity of the reason given for the employment action against him and also was able to demonstrate that it was a pretext for discriminatory animus. In *Reeves*, the Court stated "whether a *prima facie* case plus an employer's pretexual reason for firing is sufficient to overcome a Motion for Summary Judgement depends on the strength of the Plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, any other evidence that supports the employer's case." *Reeves*, 120 S. Ct. at 2109. Whitson did not offer proof of pretext, but instead admitted, that the reason for the restructuring was for management to gain better control over whoever was going to supervise employees and control the permits issued by the office. The fact that he submits some opinion evidence as to some, and definitely not any where close to all, of the negative evaluations does not create an issue of fact for summary judgement.

### D. Whitson does not demonstrate a pretext for discrimination on the basis of age or disability for his termination.

Defendant will not recite the law again with regard to the *McDonnell-Douglas* burden shifting analysis. Whitson was terminated by the Mayor and that decision was affirmed

by the Council after a hearing. The reasons given were insubordination. Whitson had no evidence of any discriminatory animus on the part of the Mayor or the Council. The Mayor met with Whitson, allowed him to present evidence and be represented through the hearing. The Mayor, after listening to both sides, felt the evidence showed that Whitson was insubordinate. In Whitson's deposition, he does not contradict the claims of insubordination, but simply offers some weak excuses to why his behavior should be tolerated. Whitson not only failed to carry out an inspection when told, but failed to take any action to reschedule the inspection or to pacify the "customer" – contractors and builders, waiting on the inspection. He simply left them waiting, knowing that the "customer" was expecting him to meet with them. On the heels of this incident was another incident that is described in the statement of facts, that demonstrates insubordination. Whitson does not provide evidence of falsity of these reasons for his firing. Therefore, this case is clearly distinguishable from *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) and the District Court was justified in granting summary judgement and the Eleventh Circuit Court of Appeals appropriately affirm that judgement. Whitson failed to make even a minimum showing that the City of Gulf Shores' articulated reasons for termination were untrue. The District Court and the Eleventh Circuit Court of Appeals properly did not substitute their business judgement for that of the City. Whitson did not provide any reason or evidence to show that the reasons proffered by the City should not be believed. The proffered reasons by the City are not weak, implausible, inconsistent, incoherent or contradictory such as a reasonable factfinder could find them unworthy of credence.

**2. Petitioner failed to present sufficient evidence that he was qualified under ADA and Petitioner failed to establish an actionable claim for failure to accommodate his disability**

The ADA mandates that employers shall not discriminate against, "a qualified individual with a disability because of the disability of such individual in regards to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a). A *prima facie* case of disability discrimination is made when, by preponderance of the evidence, the plaintiff demonstrates that he 1) has a disability; 2) is a qualified individual with a disability; and 3) was subjected to unlawful discrimination because of a disability. 42 U.S.C. § 12112(a); *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999). As stated above in Section 1, Whitson cannot demonstrate he is a qualified individual with a disability. For purposes of brevity, the City incorporates that argument by reference from the previous section.

Assuming for purposes of argument that Whitson was a qualified individual with a disability, the City did not fail to make reasonable accommodations for him in violation of the ADA. The Court has recognized that unlawful discrimination can consist of failure by the employer to provide reasonable accommodations for the employee's disability. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). In addressing ADA discrimination claims, the Eleventh Circuit addressed reasonable accommodations as follows:

> An accommodation can qualify as 'reasonable,' and thus be required by the ADA, only if it enables the employee to perform the essential functions of the job. *See LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998). The plaintiff bears the burden of identifying an

> accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions. *See Stewart v. Happy Harmon's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) [sic] *Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997).

*Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255-1256 (11th Cir. 2001).

Whitson asked Foote to allow him to tape meetings even though the purpose of the taping was to "build a record" and did not effectively assist his disability. Foote agreed to the taping. No other accommodations were requested of Foote. When Foote got an evaluation of Whitson's hearing and tried later to have a follow-up evaluation, Whitson had a lawyer write the City objecting to the testing. Mitch Ferguson, the personnel director, was allegedly approached by Whitson in October of 1999 and asked generally for "help" because Whitson said he would not be able to work much longer with his hearing problem. Whitson also testified that his hearing never prevented him from carrying out his duties. Ferguson asked Whitson to have his hearing evaluated again in February of 2000. General requests for "help" with working conditions are not sufficient to trigger the duty to make reasonable accommodations; Whitson must be able to identify an accommodation that would enable him to perform the essential functions of his job. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d at 1255-1256. Whitson's generalized request is insufficient. He never made a specific request for assistance to anyone who had decision-making authority at the City that was not granted. The report received by Ferguson suggests some possible equipment that could help some individuals with hearing loss but never says that the equipment is needed for Whitson to perform the essential functions of his job. One piece of equipment, a hearing aid, would not be a reasonable accommodation since, it is primarily for personal

use and because of its expense and minimal benefit. Likewise, neither Whitson nor his doctors said he needed a TTY phone to perform the essential functions of his job and Whitson had available the other telephone equipment suggested by the report, such as a hands-free phone. Ferguson priced the TTY equipment in April of 2000 and continued looking at these options up to the time that Whitson left work under FMLA stating he was unable to perform the essential functions of his job because of depression and seeking long-term disability benefits.

Finally, Whitson claimed that a humidity problem existed at the office. This alleged problem was first complained about years before his EEOC Complaint. It was investigated by the City and the City could not verify that a problem existed. The City did provide de-humidifiers for a time. This Complaint is outside the 180 days of the EEOC filing and does not rise to an accommodation under ADA and is speculative at best.

The City submits that Whitson's request for help with his work conditions are not sufficient to trigger a duty to provide any reasonable accommodation to Whitson. *Lucas v. W.W. Grainger*, 257 F.3d at 1255-1256. Moreover, as we have argued above, Whitson's inability to carry out the essential functions of his job was not related to his disability, but rather to personality traits not protected by the ADA. There was, therefore, no reasonable accommodation that the City could have made that would have rendered Whitson capable of fulfilling the essential requirements of his job. Each accommodation request would be over 180 days from the EEOC Complaint being filed, and therefore would be barred.

**3. Petitioner failed to present sufficient evidence of a causal link between his complaint with the EEOC and the decision to terminate him.**

Whitson alleges that the City terminated him in retaliation for his filing of a Complaint with the EEOC. It is an uncontested fact that the City initiated termination proceedings for Whitson on November 13, 2000. Likewise, it is an uncontested fact that the City did not receive notice of Whitson's EEOC Complaint until November 20, 2000. Whitson told no one with the City prior to filing a complaint with the EEOC that he was discriminated against on the basis of disability or age. It is, therefore, uncontested that the City was not aware of the existence of Whitson's EEOC claim at the time that it began termination proceedings. The elements of a *prima facie* case of retaliatory discharge are set out below. *Gross v. Culbro Corporation*, 1987 WL 46324,* 8 (N.D. Fla. 1987); *Damron v. Yellow Freight System, Inc.*, 18 F. Supp. 812, 831 (E.D. Tenn. 1998). These elements are as follows:

1. That the employee engaged in a protective activity;

2. That the employee suffered an adverse employment action; and

3. That the employee's participation in the protected activity was causally connected to the adverse employment action.

*See Id.*

For the purposes of this proceeding, the City will concede that Whitson is able to meet the first two elements of the retaliatory termination claim. However, the City submits that the uncontested facts of this case dictate that Whitson has not, and indeed cannot, demonstrated that his claim meets

the third element of a *prima facie* case of retaliatory termination under the ADEA or ADA. It is an uncontested fact that the City did not know that Whitson had filed an EEOC Complaint. It therefore follows that the decision to seek the termination of Whitson, which was made before the City had any way of knowing about the EEOC Complaint, cannot be causally connected to the filing of the EEOC Complaint. A causal connection between an employer's decision to terminate an employee and the employee's filing of an EEOC Complaint simply cannot exist, independent of knowledge on the employer's part that the employee has actually filed a complaint. Indeed, in its discussion of *prima facie* retaliation under the ADEA, the District Court for the Eastern District of Tennessee has gone so far as to include, as an element of a *prima facie* case, that the employer must know that the employee has engaged in a protected activity. *Damron v. Yellow Freight System, Inc.*, 18 F. Supp.2d 812, 835 (E.D. Tenn. 1998).

In addition to the lack of knowledge, the City contends that no causal connection exists because it had legitimate non-retaliatory reasons to terminate. These reasons are set out in more detail in the Section One of the Reasons for Denying the Petition.

## CONCLUSION

Based on the foregoing, Respondent the City of Gulf Shores respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari of Plaintiff.

Respectfully submitted,

WILLIAM F. PATTY
BEERS, ANDERSON, JACKSON, PATTY
& VAN HEEST, P.C.
250 Commerce Street
Montgomery, AL 36104
(334) 834-5311

*Attorneys for Respondent*